IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 27, 2007 Session

STATE OF TENNESSEE v. JAMES CARSON HONEYCUTT

Appeal from the Criminal Court for Claiborne County
No. 12768 E. Shayne Sexton, Judge

No. E2007-00303-CCA-R3-CD - Filed July 2, 2008

In August 2005, a Claiborne County jury convicted the defendant, James Carson Honeycutt, of two counts of aggravated burglary, two counts of theft of property over $1000, one count of forgery, and one count of possession of drug paraphernalia. The defendant received an effective sentence of thirty-four years in the Department of Correction. On appeal, the defendant argues that (1) the evidence produced at trial was insufficient to sustain his convictions for forgery against one victim and aggravated burglary and theft regarding another victim; (2) the trial court erred by refusing to redact certain irrelevant and prejudicial information from the defendant's pre-trial statement to police; (3) the trial court erred by denying the defendant's motion to sever the counts; (4) the trial court erred by allowing the state to use the defendant's previous forgery convictions for impeachment purposes where the defendant was being tried for forgery and the defendant's statement referenced his presence during other uncharged acts of forgery; and (5) the trial court improperly sentenced the defendant, both in imposing excessive sentences on certain counts and imposing consecutive sentences. After reviewing the record, we conclude that the trial court did commit error as to the defendant's second and third issues, but such errors were harmless. We also conclude that the trial court committed no error as to any of the other issues and therefore affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ. joined.

Wesley D. Stone, Franklin, Tennessee, for the appellant, James Carson Honeycutt.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; William Paul Phillips, District Attorney General; Jared Effler, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In April 2005, a Claiborne County grand jury indicted the defendant on six counts of aggravated burglary, a Class C felony, four counts of theft of property over $1000, a Class D felony, one count of forgery, a Class E felony, one count of theft over $500, a Class E felony, and one count of possession of drug paraphernalia, a Class A misdemeanor. Prior to trial, the defendant moved for severance of the offenses. The trial court used the matters contained in the defendant's statement to police to determine which cases would be tried first. The trial court ruled that because the defendant mentioned victims Randall Meyers, Chris and Angie Goins, and Mark Buchanan in his statement, those counts of the indictment concerning those victims (one count each of aggravated burglary and theft over $1000 as to Meyers, one count each of forgery, aggravated burglary, and theft over $1000 as to Mr. and Mrs. Goins, and one count each of aggravated burglary and theft over $1000 as to Buchanan) would be tried together, along with one count of possession of drug paraphernalia.[1]

At trial, Velva Grubbs testified that on November 10, 2004, she was living on Buchanan Ridge Road in Tazewell, and that her nephew, Mark Buchanan, lived approximately 1000 to 1500 feet away from her on the same road. She testified that on that day, a small car with a "faded looking red" paint job turned around in her driveway. Grubbs said that she was not familiar with the car. When shown a photograph of a car,[2] she said that the car depicted in the photograph "looks like the car that turned around in my driveway." On cross-examination, Grubbs admitted that she could not be "a hundred percent sure" that the car depicted in the photograph was the same red car that she saw in her driveway that day.

Mark Buchanan testified that on November 10, 2004, he left his residence, located on Buchanan Ridge Road in Tazewell, around 7:30 a.m. When he returned to his residence at around 10:30 p.m., he noticed that his front door was "wide open," and that some gun clips and holsters were located on the front steps. He then called 911 and waited for the police to arrive. Once the police arrived, he and an officer entered the house. Buchanan noticed that a back window had been broken, a microwave stand had been overturned, and a closet door had been opened. Buchanan testified that he kept three shotguns, four rifles, and five pistols in the closet, and that the guns were missing. Buchanan testified that he had not seen the guns since they were taken from him. Buchanan testified that the total value of the guns was approximately $3000.

Chris Goins testified that on November 26, 2004, he lived with his wife, Angie, in Claiborne County. He left his residence that morning and returned at approximately 1:00 p.m. Upon returning, he observed that the carport door had been "busted out" and his home broken into. Goins testified that he then entered his residence to make sure that nobody was still in the house. When he entered his house, he saw that all the drawers in the master bedroom had been gone through and that a closet

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[1] In April 2006, the defendant entered nolo contendere pleas on three counts of aggravated burglary regarding three other victims. The other counts of the indictment were dismissed. The defendant received a ten-year sentence on each conviction, with the sentences to be served concurrently with the sentences imposed on the convictions received in the instant matter.

[2] This photograph does not appear in the record on appeal.

door was open. He noted that the drawers and closet in another room had been gone through as well. Goins testified that some jewelry (particularly his wedding band, one of his chains, some necklaces belonging to his wife, as well as some rings and bracelets belonging to his wife) that had been left in a jewelry box atop a dresser in the master bedroom was missing. Goins testified that the total value of the missing jewelry was somewhere between $2000 and $3000.

Goins also testified that he later discovered that some checks had been taken from the top drawer in the master bedroom. When shown two of the checks that had been stolen from his residence, Goins noted that they contained writing (one check contained only a signature, while another was completely filled out) that did not belong to either him or his wife. Goins testified that he did not give anyone permission to enter his house and take his jewelry and checks.

Angie Goins testified that she was Chris Goins's wife and lived with him on November 26, 2004. That day, Mrs. Goins left her residence between 12:00 and 12:45 p.m. She returned home after receiving a telephone call from her husband. Upon her return, she saw that the carport door had been broken into, and she saw that closet doors had been opened and dresser drawers had been pulled out. She testified that a jewelry box and personal checks had been taken from the residence. When shown two of the checks that were taken, she testified that the writing appearing on the checks did not belong to either her or her husband. Mrs. Goins testified that the value of the jewelry taken from the residence was "at least $2000."

Randall Meyers testified that on December 3, 2004, he lived on Dogwood Road in Claiborne County. He testified that he left his residence between 7:30 and 8:00 that morning, but he returned home a short time later when a Claiborne County sheriff's deputy called him and instructed him to unlock the doors to the residence. Meyers said that he did not notice anything unusual when he returned home, and he returned to work after complying with the deputy's request. Meyers testified that later that morning, between 11:00 and 11:30, he received a second telephone call from police, this time informing him that the police had apprehended a suspect in his driveway. The police also told Meyers that they wanted him to return home to identify his guns. Meyers complied with the request. Upon his return home, Meyers saw several police cars in his driveway, along with a "red or maroon looking vehicle with my guns in the trunk of that car." Meyers said that he found six of his guns in the car that day, and he noted that a photograph of a vehicle with six guns leaning against it fairly and accurately depicted the vehicle found in his driveway and his guns. Meyers testified that the total value of the guns was between $1200 and $1500. Meyers testified that he did not give anyone permission to enter his house and take his guns.

On cross-examination, Meyers admitted that Detective Davidson with the Claiborne County Sheriff's Department told him to unlock the doors to his residence. When asked if he thought that, after this telephone call, someone would break into his house and take some items from his house, Meyers replied that this was his understanding. Meyers also said, "I guess I did give permission for someone to be in my house, but it was there lawful." Meyers also said that other than the guns, nothing else was disturbed in his house the day the defendant was arrested. He admitted that in light of this evidence, it appeared that whomever entered the house was looking for something fairly specific in his home.

David Daniels, the Chief of Detectives with the Claiborne County Sheriff's Department, testified that on the evening of December 2, 2004, he received a telephone call from one of his detectives, Detective Davidson, advising him that there would possibly be a burglary taking place in Claiborne County the next day, and that Detective Davidson wanted to meet with detectives from the Criminal Investigation Division the next morning. Detective Daniels testified that on the morning of December 3, he and several other Claiborne County detectives went to the Meyers residence. Detective Daniels stood inside a pigeon coop, a position from which he could see the rear of the house. At some point before 10:45 a.m., he saw a vehicle pull into the driveway. According to Detective Daniels, the defendant exited the vehicle and made two trips into the Meyers residence. On each trip, the defendant exited the house with some "long guns," which he placed into the trunk of his vehicle, a burgundy-colored Ford Probe. The defendant then attempted to drive away, but he was apprehended by several Claiborne County sheriff's deputies. On cross-examination, Detective Daniels testified that the defendant was in the Meyers home for no more than five minutes. He also said that the residence did not appear to be "trashed" after the defendant was apprehended.

John McMurray testified that on December 3, 2004, he was employed as a detective with the Claiborne County Sheriff's Department. He said that he participated in surveillance of the Meyers residence the day the defendant was arrested. Detective McMurray testified that he first saw the defendant driving away from the Meyers residence in a Ford automobile. He testified that Detective Cornett, one of the other deputies conducting surveillance, blocked the defendant's exit, and Detective McMurray pulled behind Detective Cornett's car. Detective McMurray testified that after the defendant was arrested, he looked inside the defendant's car and observed six guns in the trunk. He and Detective Cornett searched inside the car, where they discovered a container of drug paraphernalia, namely a hypodermic needle, Band-Aid brand bandages, and cotton swabs. Detective McMurray also recovered items which he said were commonly used in burglaries: a dark-colored toboggan, a hammer, and some brown jersey gloves. Detective McMurray also recovered a box of checks underneath the driver's seat. Detective McMurray testified that these checks belonged to Chris and Angie Goins. Detective McMurray also recovered two checks from the Goins account on the defendant's person following his arrest.

Detective McMurray testified that he also investigated the November 2004 burglary at the Goins residence. He recalled that when he arrived at the residence the day of the burglary, the glass in a door inside the carport area had been broken; the detective opined that the perpetrator broke the glass, reached inside the door, and unlocked the door. Detective McMurray said that when he investigated the house, he noted that the perpetrator had gone through two or three bedrooms, taking some jewelry and a box of the Goins's checks. The detective said that he could not find any footprints, but he did find what appeared to be a glove print on one of the closet doors.

On cross-examination, Detective McMurray said that the defendant was not wearing gloves at the time he was arrested. The detective also said that on December 2, he had received a tip from Charles Massengill, who said that "something was going to happen" on December 3 at the Meyers residence. Detective McMurray said that he relayed this information to Detective Billy Davidson, who also spoke with Massengill. Detective McMurray again stated that the defendant was inside the Meyers residence no more than five minutes before he attempted to leave. The detective also stated that the glove print recovered from the Goins residence could not be tied to a certain

individual.

Detective Bill Davidson with the Claiborne County Sheriff's Department testified that on November 11, 2004, he investigated a burglary that had occurred the night before at Mark Buchanan's residence. He noted that a window on the back side of the residence had been broken and a microwave stand had been overturned. He also noted what appeared to be a print from a gloved hand that had been left on a microwave oven.

Detective Davidson said that on December 3, 2004, he came into contact with the defendant after he was taken into custody at the Meyers residence. Detective Davidson testified that earlier that day, he had learned that a "small reddish maroon type vehicle had been seen in the location of several . . . burglaries [taking place in Claiborne County], and this vehicle had displayed a handicapped tag." The detective also learned on the evening of December 2 that the defendant was planning to commit at least one, if not more, burglaries the following day. In light of that information, Detective Davidson conducted surveillance of the defendant.

On the morning of December 3, Detective Davidson observed the defendant exiting his residence and entering his vehicle, which Detective Davidson described as a "small, reddish maroon Ford Probe, two-door hatchback." The detective initially observed the defendant driving in one direction down Dogwood Heights Drive. According to Detective Davidson, he lost contact with the defendant before observing the defendant on Essary Road near the Meyers property. A short time later, Detective Davidson was notified via radio that the defendant had been apprehended in the driveway of the Meyers residence. The detective then went to the Meyers residence, where he saw six long guns inside the trunk of the defendant's car.

After the defendant was arrested, he was transported to the sheriff's office, where Detective Davidson interviewed him. According to the detective, the defendant signed a Miranda waiver before giving a statement to Detectives Davidson and McMurray. At trial, Detective Davidson read the statement into evidence:

> The next place I remember is the Goins house. It was the day after Thanksgiving. The reason I hit the house was because they were the only house that no one was at home at. I hadn't intended to break in anywhere that day, but the guy who usually fronts me wasn't at home and I didn't have any money.
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> I used a piece of cinder block that was laying there to bust the glass—to bust out the glass and reached in and unlocked the door. I had never been to that house before nor even knew the people. I went through the house looking for stuff. I took a jewelry box full of jewelry and a box of checks. I think I saw a four-wheeler with camouflage on it, so I thought there was probably guns in the house. I didn't find any guns in the house and thought to myself, "You've really screwed up now." I picked up the box of checks and thought about it and I sat them back down, then decided, "What the hell," and I took them anyway.
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> I was in the Probe. I left there and went and got rid of the jewelry and got my

money. I bought me some Oxy's with the $350.00 I got for the jewelry. I think there was two books of checks in that box. I kept them.

Later that day at about 2:00 to 3:00 p.m., [I guess, Benny Lane came by. He was wanting some Meth. I had been selling some Meth for awhile. I wasn't using Meth, just selling it. I may have used $40.00 of it the whole time I was out. I hooked Benny up with some Meth.][3] Benny was back in my laundry room and saw the checks I had got. Benny asked if he could have the checks. I told Benny the checks were stolen in a burglary and if he got caught on surveillance he would go down for the burglary. Benny said he never went up for a felony and told me that he would take care of the checks. I gave Benny the checks and the box. Benny agreed that we would go shopping and he would buy the stuff with the checks, then I would pay him half the price of the stuff in Meth. [Benny got $50.00 in Meth and did it quick.

Tevin (phonetic) came home and Benny wanted $50.00 more in Meth. I told him I would give him the dope but he couldn't do it there, he would have to leave. Benny took the Meth and left. He came back about 30 minutes later. He was in his car. It's some kind of old blue Buick with the wrong tags.

When he got back we got in the Probe and went to Middlesboro. We went to the mall and to the stores inside. We went to—we went to J.C. Penney's and picked some stuff out, we took it to the register, and Benny wrote a check for it.

We went to Sears and bought some tool sets and other stuff. We got some shoes and stuff from B&H shoes. We left and went to Wal-mart and wrote two checks there, one at the jewelry counter and one at the checkout. We then came home.

Benny stayed at the house that night. We got up the next morning and went to Morristown. We went to the Bi-Lo and got gas and stuff. We were in the Probe. Next, we went to Colboch's Harley Davidson. We picked out some stuff there and Benny wrote a check for it.

We went to O'Reilly's Auto Parts and got some stuff for both of our cars. I bought a gift bucket of some cleaning supplies. Benny wrote a check and we left.

We went to Save-a-Lot and Benny went in. I stayed in the car and did a shot. I think he may have bought a carton of cigarettes. We stopped at Auto Zone and I think I got a—I think got a tool set. I waited in the car. From there, we went to J.C.

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[3]The bracketed sections indicate portions of the defendant's statement which the defendant unsuccessfully sought to redact from the statement before it was admitted into evidence. The defendant challenges the trial court's admission of these portions of the statement on appeal.

Penney's in the mall. We bought some stuff there, clothes, I think. We may have went back through again and bought more stuff at J.C. Penney's. I think we may have stopped at an Exxon station, then we came home.

The next day, we went back to Middlesboro to Goody's and got some clothes. Benny said that he had a hard time getting them to accept the check, then we went home. Benny was supposed to come back the next day but didn't show.]

I had actually went up to Mark Buchanan's house about a week or two weeks [after I got out of prison] to talk about Mark and his and Lori's kid. As I drove up through the road, I passed Mark's house. I stopped at the next house and asked where Mark lived. They showed me, and I drove up to his house and knocked on the door on the end of the house, but no one answered the door so I left. I think it was about 10:30 or 11:00 a.m. I don't deny going to Mark's house, but I didn't rob him. I would look at Rocky Manning's house and check his shoes. I didn't get Mark's stuff, he's been good to me. I guess it was maybe a month after I went to Mark's that I broke into the Goins house [and then—well, I had been out of prison one to two weeks went I went to Mark's.]

I did go to Randall Meyers' house about five or six days prior to going in to case it out. I asked my cousin Charlie if he knew where I could get some guns and gold, and he said the only place he knew was Randall Meyers' but said, "I wouldn't do that." I drove up the driveway and as I pulled up, Randall's wife came outside. She was on the phone. I asked her if she had any young beagles and she said, "No, I got out of that."

I got in the car and left. Benny stayed at my house two or three days, so I really don't know what all he may have done around here, if anything. [All the checks that was wrote when I was present were not written by me. I bought all the items paid for by the checks at half price. Actually, I paid Benny in dope for the stuff.]

After taking the defendant's statement, Detective Davidson executed a search warrant for the defendant's apartment. The police located several items of drug paraphernalia in the residence, including two packaged hypodermic needles, two used needles, a pack of rolling papers, and two sets of surgical hemostats. The police also found a checkbook belonging to Chris and Angie Goins and Mrs. Goins's jewelry box.

On cross-examination, Detective Davidson said that an informant, whom he did not identify, told police that the Meyers residence was one of several locations given where burglaries might take place on December 3. Detective Davidson said he focused his investigation on the Meyers residence because that residence "seemed to be the wealthiest place." He also admitted that neither of the two checks from the Goins account that were recovered from the defendant's vehicle had been cleared or presented to any bank.

Charles Massengill, the defendant's cousin, testified for the defense. Massengill said that on the evening of December 2, 2004, he gave a statement to police. He testified that he did not tell the defendant that Randall Meyers had guns that Massengill had pawned to him. Massengill also testified that he did not tell the defendant that he wanted the defendant to get his guns and that he did not tell the defendant that there were guns in the Meyers living room.

The defendant testified that he was released from the custody of the Department of Correction on October 17, 2004. The defendant claimed that he was released from prison three years early; he said that he was of the impression that he was to serve consecutive sentences but that the Department computed his sentences so that he would serve concurrent sentences. He testified that after being released, he worked as a laborer on various construction jobs in Claiborne County. He testified that as part of his work, he wore brown jersey gloves "every day pretty much."

The defendant denied breaking into the Buchanan house and stealing the guns there. Regarding the guns at the Meyers residence, the defendant testified that Massengill told him that he (Massengill) had pawned six guns to Meyers, and that he wanted the defendant to retrieve the guns, which were located in the living room of the Meyers house. The defendant testified that on December 3, 2004, he went to the Meyers residence where he found a door to the house unlocked. The defendant entered the house and located the six guns in the living room, where Massengill had said they would be located. The defendant said that he was in the Meyers house two to three minutes before leaving the house. The defendant testified that the police stopped his vehicle before he left the Meyers driveway.

The defendant reiterated that he did not go to the Meyers house intending to steal any guns. Rather, he intended to pick up the guns belonging to Massengill, his cousin. The defendant testified that he was initially skeptical about the plan, but when he arrived at the house and noticed that the door was unlocked, "that really assured me that . . . this [was] a legit deal."

On cross-examination, the defendant admitted that in his statement to police, he said that the statement had not been coerced in any way. The defendant also acknowledged that he had told the police in his statement that he had "hit" the Goins residence because nobody was at home. The defendant admitted that he stole jewelry from the Goins residence and later sold the jewelry for $350. The defendant admitted that he used the money to buy pills "to shoot up with," and that the needles found in his car when he was arrested were the kind of needles he used to inject drugs. The defendant admitted that he had in his possession two of the Goins's checks that had been filled out, but he denied that he intended to cash or pass the checks. The defendant also admitted that in his statement to police, he did not mention Massengill's wanting him to retrieve the guns from the Meyers residence.

At the conclusion of the proof, the jury found the defendant guilty of possession of drug

paraphernalia,[4] forgery, and of the aggravated burglary and theft of property over $1000 charges regarding victims Meyers and Goins. The jury acquitted the defendant of the aggravated burglary and theft of property over $1000 regarding victim Buchanan. The trial court sentenced the defendant to an effective sentence of thirty-four years in prison. This appeal followed.

I. SUFFICIENCY OF EVIDENCE

The defendant argues that the evidence produced at trial was insufficient to support his convictions for aggravated burglary and theft of property against victim Randall Meyers and for forgery. We disagree.

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

Aggravated Burglary and Theft Convictions

The defendant was convicted of aggravated burglary and theft of property against victim Meyers. As charged in the indictment, a person is guilty of burglary "who, without the effective consent of the property owner . . . [e]nters a building . . . (or any portion thereof) not open to the public, with intent to commit . . . theft." Tenn. Code Ann. § 39-14-402(a)(1) (2003). Aggravated burglary is burglary of a habitation. Id. § 39-14-403. The appellant was charged with theft, which occurs when a person "with intent to deprive the owner of property . . . knowingly obtains or exercises control over the property without the owner's effective consent." Id. § 39-14-103.

The defendant's challenge to these convictions is based largely on his contention that he entered the Meyers residence with the intent to retrieve guns that belonged to Charles Massengill.

[4] The defendant was sentenced to eleven months, twenty-nine days on this conviction, with the sentence to be served concurrently with the remainder of the defendant's sentences. The defendant does not challenge his conviction or sentence for this offense on appeal.

The defendant argues that because he mistakenly believed that the guns belonged to Massengill, he did not have the intent to permanently deprive Meyers of ownership of his guns, and therefore his convictions for theft and aggravated burglary are not supported by the evidence produced at trial. The defendant also argues that his aggravated burglary conviction is not supported by the evidence because Meyers, by leaving the doors to his residence open after being ordered to do so by the police, effectively gave the defendant consent to be in his residence.

The evidence produced at trial, reviewed in a light most favorable to the state, established that the defendant entered the Meyers residence, removed from a closet six guns belonging to Meyers, placed them in his car, and attempted to drive away before he was apprehended by Claiborne County sheriff's deputies. Meyers testified that he did not give the defendant permission to enter his house or take his guns, and Massengill testified that, despite the defendant's assertions to the contrary, he did not pawn his guns to Meyers and did not instruct the defendant to enter the Meyers residence and take the guns. The defendant's claim that Massengill told him to retrieve the guns from the Meyers residence was not supported by any other witness, and the defendant did not attempt to ascertain the true ownership of the guns or gain permission from Meyers to enter the house prior to the act. In short, the jury chose to accredit the testimony of the other witnesses and refused to accredit the defendant's testimony, as was its prerogative. The evidence produced at trial was sufficient for a rational jury to find beyond a reasonable doubt that the defendant possessed the requisite intent to commit theft of Meyers's guns at the time he entered the residence and removed the guns from the residence. As such, the evidence was sufficient to support the defendant's convictions for aggravated burglary and theft, and the defendant is denied relief on this issue.

Forgery

The defendant was also convicted of forgery. Tennessee Code Annotated section 39-14-114(a) provides that "[a] person commits an offense who forges a writing with intent to defraud or harm another." The statute further provides:

> (b)(1) "Forge" means to:
>
> (A) Alter, make, complete, execute, or authenticate any writing so that it purports to:
>
> (I) Be the act of another who did not authorize that act;
>
> . . . .
>
> (C) Issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of subdivision (1)(A); or
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> (D) Possess a writing that is forged within the meaning of subdivision (1)(A) with intent to utter it in a manner specified in subdivision (1)(C); and
>
> (2) "Writing" includes printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, and symbols of value,

right, privilege, or identification.

Tenn. Code Ann. § 39-14-114(b)(1)-(2) (2003). This court has held that "[t]he offense is complete by the forgery with fraudulent intent, whether any third person be actually injured or not. It is sufficient [that] the instrument forged, with the fraudulent intent, might have been prejudicial to the rights of another." State v. James, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984) (citation omitted).

The defendant argues that because one of the two checks recovered from the defendant's vehicle did not contain a payee or an amount, and because the other check was not presented to a bank for payment and was dated seven days prior to the defendant's arrest, the evidence produced at trial was insufficient to support the defendant's forgery conviction. However, the forgery statute does not require that a check be presented or cashed to sustain a forgery conviction. Rather, the evidence need only show that the defendant possessed a forged instrument with the intent to "[i]ssue, transfer, register the transfer of, pass, publish, or otherwise utter" it, and that the defendant intended to defraud another in the process. The evidence produced at trial, viewed in a light most favorable to the state, showed that the defendant was in possession of a check belonging to Chris and Angie Goins that was made out to a payee, Billy West, in the amount of $346.50, contained a signature purporting to be that of either Mr. or Mrs. Goins, and contained an endorsement purporting to be that of Billy West. The intent to defraud Mr. and Mrs. Goins was established by the defendant's statement to police, in which he admitted that he stole the checks from the Goins residence and that he and an associate devised a scheme in which the two men would use the stolen checks to buy merchandise. Based on this evidence, a rational jury could have found that the defendant committed the elements of forgery beyond a reasonable doubt. Thus, the evidence produced at trial was sufficient to sustain the forgery conviction and the defendant is not entitled to relief on this issue.

II. REDACTION OF DEFENDANT'S STATEMENT

The defendant argues that the trial court erred by refusing to grant the defendant's pre-trial motion to redact those portions of the defendant's statement to police listed above in brackets. The defendant asserts that these sections constituted evidence of prior bad acts that unfairly prejudiced him and that this evidence should have been excluded pursuant to Rule 404(b) of the Tennessee Rules of Evidence.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. Tenn. R. Evid. 404(b). Rule 404(b) is generally one of exclusion, but exceptions to the rule may occur when otherwise inadmissible evidence is offered to prove the motive of the defendant, identity, intent, the absence of mistake or accident, opportunity, or common scheme or plan. State v. Tolliver, 117 S.W.3d 216, 230 (Tenn. 2003); State v. McCary, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003). Rule 404(b) states that a jury-out hearing regarding the admissibility of specific instances of conduct must be held "upon request." Tenn. R. Evid. 404(b)(1). In order to determine the admissibility of a prior bad act, the trial court should consider the following three factors: (1) whether a material issue exists supporting admission of the prior act; (2) whether proof of the prior act is clear and convincing; and (3) whether the probative value of the evidence is not outweighed by the danger of unfair prejudice. Tenn. R.

Evid. 404 (b)(2)-(4). If these three thresholds are met, the evidence may be admitted. We review a trial court's ruling on evidentiary matters under Rule 404(b) for abuse of discretion, provided the trial court has substantially complied with the procedural prerequisites of the rule. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). However, if the trial court did not substantially comply with the procedure, its decision is not entitled to deference by the court, and "the determination of admissibility will be made by the reviewing court on the evidence presented at the jury out hearing." Id. at 653.

In this case, although the trial court held a hearing regarding the defendant's motion in limine, the trial court did not follow the procedural guidelines established in Rule 404(b) for determining whether testimony of prior bad acts is admissible. Therefore, we must review the evidence presented at the hearing in light of Rule 404(b)'s requirements to determine whether the trial court's denial of the defendant's motion was proper. We also must examine the evidence in light of Tennessee Rule of Evidence 402, which states that "[e]vidence which is not relevant is not admissible."

After reviewing the record, we conclude that no error exists regarding the trial court's admission of the defendant's statement concerning his and Lane's use of the checks from the Goins account to purchase items from various stores. The defendant was charged with theft of the checks and with forgery, and evidence regarding the defendant's use of the checks was relevant to the material issues of motive and intent as to the theft and forgery charges. Evidence regarding the defendant's using the Goins checks to purchase merchandise was clear and convincing, given the defendant's confession, and admission of the portion of the statement describing the defendant and Lane trading goods bought with the checks stolen from Mr. and Mrs. Goins for drugs was not unfairly prejudicial in light of the admission, without objection, of the portion of the statement describing in detail the defendant's and Lane's plan to buy merchandise with the stolen checks and trade the goods for drugs. Therefore, admission of this portion of the defendant' statement was proper.

Conversely, we conclude that the trial court's refusal to redact two disputed sections of the defendant's statement—one in which the defendant admitted to being released from prison, and another in which he admitted to selling drugs to Benny Lane in a transaction unrelated to the check writing scheme —was error. These portions of the statement were not relevant to any material issue regarding the offenses that were the subject of this case, and thus were subject to exclusion under Rule 402. Furthermore, the evidence should have been excluded because the danger existed that the prejudicial nature of the evidence would outweigh its probative nature.

Harmless Error Analysis

Our finding that the trial court erred in admitting certain parts of the defendant's statement does not end our analysis. The United States Supreme Court has "repeatedly recognized" that "'most constitutional errors can be harmless.'" Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2551 (2006) (citing Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827 (1999) and quoting

Arizona v. Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246 (1991)). The Tennessee Rules of Appellate Procedure provide for harmless error review. See Tenn. R. App. P. 36(b). However, "[a]ll errors are not the same, nor do they have the same effect on the judicial process in general or on a particular trial." State v. Edwardo Rodriguez, ___ S.W.3d ___, No. M2005-02466-SC-R11-CD, 2008 WL 1817361, at *8 (Tenn. Apr. 24, 2008). Accordingly, our supreme court "has recognized three categories of error—structural constitutional error, non-structural constitutional error, and non-constitutional error." Id. (citations omitted). As relevant to this issue, our supreme court has noted that "errors in the admission of evidence do not normally take on constitutional dimensions." Id. at *11 (citing State v. Powers, 101 S.W.3d 383, 397 (Tenn. 2003)).

In determining whether non-constitutional errors are harmless, "Tennessee law places the burden on the defendant who is seeking to invalidate his or her conviction to demonstrate that the error 'more probably than not affected the judgment or would result in prejudice to the judicial process.'" Id. at *8 (quoting Tenn. R. App. P. 36(b); other citations omitted). While substantial evidence of the defendant's guilt makes it difficult for "the defendant to demonstrate that a non-constitutional error involving a substantial right more probably than not affected the outcome of the trial," harmless error inquiry "does not turn upon the existence of sufficient evidence to affirm a conviction or even a belief that the jury's verdict is correct." Id. at **8-9 (citations omitted). Rather, "the crucial consideration is what impact the error may reasonably be taken to have had on the jury's decision making. Id. at *9 (citations omitted).

In this case, it does not appear that the erroneously-admitted portions of the defendant's statement prejudiced him or affirmatively affected the result of the trial on the merits. In his trial testimony, the defendant admitted to being released from prison in October 2004, so the statement's references to the defendant's being released from prison were not prejudicial in that these references added nothing significant to his trial testimony. Furthermore, the defendant did not object to those parts of his statement in which he admitted selling the jewelry he stole from the Goins house for drugs and in which he planned to provide Lane with drugs to "pay" for the merchandise purchased with the stolen Goins checks. Thus, the portions of the defendant's statement in which he admitted selling drugs to Lane were not prejudicial in that they likewise added nothing significant to his trial testimony. In light of these facts and our conclusion that the evidence produced at trial was sufficient for the jury to convict the defendant, any error the trial court committed by admitting the otherwise irrelevant sections of the defendant's statement was harmless beyond a reasonable doubt. See Tenn. R. App. P. 36(b). Finding no reversible error as to the defendant's statement, we deny the defendant relief on this issue.

III. SEVERANCE OF OFFENSES

The defendant next argues that the trial court erred in denying his motion for severance. As stated above, the defendant was indicted on thirteen counts relating to offenses involving six different victims. In a pre-trial motion, the defendant sought to have the offenses involving each victim tried separately, with the exception of the forgery indictment, which the defendant sought to

have tried separately from the other charges regarding the victim Goins. Following a pre-trial hearing, the trial court ruled that the offenses relating to the victims mentioned in the defendant's statement to police (Meyers, Goins, and Buchanan) would be tried together, along with the defendant's possession of drug paraphernalia charge. The defendant alleges that this decision prejudiced him, while the state argues that the trial court properly denied the defendant's motion because the offenses were properly joined under Rules 8 and 14 of the Tennessee Rules of Criminal Procedure. We conclude that the trial court's denial of the defendant's severance motion was error, but that the error was harmless beyond a reasonable doubt.

The standard of review of a trial court's decision to consolidate or sever offenses is an abuse of discretion. State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999). An appellate court will not interfere with the exercise of this discretion unless it appears on the face of the record that the accused was prejudiced by the court's ruling. State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App. 1982). The decision to grant or deny a severance "depends upon the facts and circumstances involved in the various crimes charged." State v. Morris, 788 S.W.2d 820, 822 (Tenn. Crim. App. 1990).

Rule 8(b) of the Tennessee Rules of Criminal Procedure allows for the permissive joinder of offenses and states that "[t]wo or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13 if the offenses constitute parts of a common scheme or plan or if they are of the same or similar character." Tenn. R. Crim. P. 8(b). Additionally, Rule 13(a) of the Tennessee Rules of Criminal Procedure provides that "[t]he court may order consolidation of two or more indictments, presentments, or informations for trial if the offenses and all defendants could have been joined in a single indictment, presentment, or information pursuant to Rule 8." However, Rule 14 of the Tennessee Rules of Criminal Procedure states that "[i]f two or more offenses have been joined or consolidated for trial . . . , the defendant shall have a right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others." Tenn. R. Crim. P. 14(b)(1) (emphasis added). Therefore, in order to deny a motion for severance the trial court must be satisfied in two findings: a common scheme or plan and the admissibility of evidence against one another in separate trials. See State v. Hallock, 875 S.W.2d 285, 289 (Tenn. Crim. App. 1993); see also State v. Tolivar, 117 S.W.3d 216, 227-31 (Tenn. 2003).

In further examining the requirements of Rules 8(b) and 14(b)(1), the Tennessee Supreme Court stated:

> Before consolidation is proper, the trial court must conclude from the evidence and arguments presented at the hearing that: (1) the multiple offenses constitute parts of a common scheme or plan, Tenn. R. Crim. P. 14(b)(1); (2) evidence of each offense is relevant to some material issue in the trial of all the other offenses, Tenn. R. Evid. 404(b)(2); [State v.] Moore, 6 S.W.3d [235,] 239 (Tenn. 1999); and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant, Tenn. R. Evid. 404(b)(3). Further, because the trial court's decision of whether to consolidate offenses is determined from the evidence presented at the hearing, appellate courts

> should usually only look to that evidence, along with the trial court's findings of fact and conclusions of law, to determine whether the trial court abused its discretion by improperly joining the offenses.

Spicer v. State, 12 S.W.3d 438, 445 (Tenn. 2000).

Tennessee recognizes three bases upon which evidence of a common scheme or plan can be established: (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction. State v. Shirley, 6 S.W.3d 243, 248 (Tenn. 1999) (citation omitted). In determining whether a series of crimes are of the same distinctive design or signature, the court must "look to the methods used to commit the crimes and not merely enumerate their similarities and differences. Even though offenses may be similar in many respects, they can not be classified as signature crimes if they lack a distinct modus operandi." Id. For offenses to be considered part of a continuing plan or conspiracy, the crimes must be directed toward a "'common goal or purpose.'" State v. Denton, 149 S.W.3d 1, 15 (Tenn. 2004) (quoting State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995)). Furthermore, this category "requires proof of 'a working plan, operating towards the future with such force as to make probable the crime for which the defendant is on trial.'" State v. Allen Prentice Blye, No. E2001-01375-CCA-R3-CD, 2002 WL 31487524, at *5 (Tenn. Crim. App. Nov. 1, 2002 (quoting Hoyt, 928 S.W.2d at 943)).

The continuing plan or conspiracy category "has typically been restricted to cases involving crime sprees, where the defendant commits several crimes quite closely in time to one another." Id. (citing State v. Hall, 976 S.W.2d 121, 146 (Tenn. 1998) (appendix)). See generally Hall, 976 S.W.2d 146 (appendix) (joinder of trials for burglaries, larcenies, and murder proper where defendants committed offenses following escape from prison; larger plan was to flee the country and avoid capture); State v. William Arthur Shelton, No. E2005-02014-CCA-R3-CD, 2006 WL 3246100, at *4 (Tenn. Crim. App. Nov. 9, 2006) (joinder of kidnapping, vandalism, and murder trials proper where defendant detained occupants of a residence in an attempt to lure murder victim to the residence; defendant also vandalized car to prevent kidnapping victims from escaping), app. denied (Tenn. 2007); State v. William Ramsey, No. M2001-02735-CCA-R3-CD, 2003 WL 21658589, at *9 (Tenn. Crim. App. July 15, 2003) (joinder of aggravated robbery and theft offenses occurring four months apart proper where defendant committed offenses in attempt to retaliate against victim, who had abused former codefendant's stepsister); State v. Mario Antoine Leggs, No. M2002-01022-CCA-R3-CD, 2003 WL 21189783, at *5 (Tenn. Crim. App. May 21, 2003) (joinder of multiple offenses including aggravated robbery, reckless aggravated assault, and theft proper where defendant, over a three-week period, stole several women's purses in the parking lot of a particular store at a particular mall; "offenses were part of a larger, continuing plan to steal women's purses" at that particular location).

In this case, it is unclear which of these three bases the state or the trial court used to establish the existence of a common scheme or plan. At the pre-trial hearing, the state noted that all of the offenses "constitute[d] part of a common scheme or plan or . . . [were] part of the same or similar character" based on the fact that the defendant, at the time he was arrested at the Meyers residence, had property taken from the Goins residence, and that following his arrest, the defendant gave a

statement in which he "outline[d] his involvement in both the Randall Meyers burglary and the Goins burglary." The state also noted that the other burglaries "were all committed in a same or similar manner," and "the defendant was operating the same motor vehicle which was described by other witnesses in the other burglaries."

After reviewing the record, we conclude that the aggravated burglary and theft offenses involving victim Buchanan should have been tried separately from the offenses involving the other two victims. Regardless of whether the offenses concerning Buchanan were part of a common scheme or plan, the evidence needed to establish the essential elements of these offenses would not have been admissible in the defendant's trials concerning victims Meyers and Goins. Nor would evidence from the Goins and Meyers offenses been admissible in a trial concerning the Buchanan offenses. However, because the jury acquitted the defendant of aggravated burglary and theft concerning Buchanan, the trial court's error in joining these offenses to those concerning the other two victims was harmless beyond a reasonable doubt. See Tenn. R. App. P. 36(b).

We next turn our attention to the offenses involving victims Goins and Meyers. The forgeries, burglaries and thefts were not "signature" offenses and were not part of the same criminal transaction. Furthermore, we find the state's argument on appeal that the offenses were directed toward a "continuing plan or conspiracy"—namely, the defendant committed the burglaries and thefts with the "common goal or purpose" of acquiring items which would be sold, and in turn the proceeds would be used to purchase illegal drugs—unavailing. The state has provided no evidence to show that the Goins and Meyers burglaries were conducted as part of "a working plan, operating towards the future with such force as to make [the other offenses probable]." See Hoyt, 928 S.W.2d at 943; Allen Prentice Blye, 2002 WL 31487524, at *5. Rather, these offenses are more akin to a hypothetical scenario provided by our court: "X is on trial for three counts of burglary, each involving a different building, a different form of entry, and a different day. His overall purpose, however, was to acquire money for college. Clearly, without more, X is entitled to severance under Rule 14(b)(1)." State v. Hallock, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). Accordingly, the Goins and Meyers burglaries were not part of a common scheme or plan, and the trial court erred by failing to grant the defendant's severance motion regarding these offenses.

Harmless Error Analysis

However, we conclude that this error was harmless. Our supreme court has held that errors regarding joinder and severance of offenses are "neither structural, requiring an automatic reversal, nor constitutional, which requires reversal unless the error is harmless beyond a reasonable doubt." State v. Andre Dotson, ___ S.W.3d ___, No. W2005-01594-SC-R11-CD, 2008 WL 1848358, at *6 (Tenn. Apr. 28, 2008) (citations omitted). Accordingly, "the burden [is] on the defendant who is seeking to invalidate his or her conviction to demonstrate that the error 'more probably than not affected the judgment or would result in prejudice to the judicial process.'" Rodriguez, 2008 WL 1817361, at *8. (quoting Tenn. R. App. P. 36(b); other citations omitted). In this case, the defendant cannot meet this burden. The record reveals that the defendant was arrested on the Meyers property after he was observed entering the Meyers residence twice and removing guns from the residence. At the time of his arrest, the defendant was found with guns from the Meyers residence and checks

from the Goins residence. Furthermore, the defendant confessed to committing the Goins burglary, and property belonging to Mr. and Mrs. Goins was found at the defendant's residence. Concluding that all errors regarding joinder and severance were harmless beyond a reasonable doubt, we deny the defendant relief on this issue.

IV. USE OF PRIOR FORGERY CONVICTIONS FOR IMPEACHMENT PURPOSES

According to the state's brief, prior to trial the state filed notice, pursuant to Rule 609 of the Tennessee Rules of Evidence, to use some of the defendant's prior convictions against him for impeachment purposes. The record reflects that among the defendant's prior felony convictions were twenty-three forgery convictions from five separate cases, although it is unclear from the record exactly how many of these prior convictions the state sought to use for impeachment. Following a jury-out hearing at the close of the state's proof, the trial court ruled that while the state could not use all of the forgery convictions it had intended to use to impeach the defendant, the state could use one forgery conviction per case number, a total of five convictions, to impeach the defendant were he to testify. The defendant argues that because the offenses from the impeaching convictions were identical to one of the offenses for which he was tried, the trial court's ruling prejudiced him. He also argues that the trial court failed to follow the proper procedure for admitting such proof as established in the Rules of Evidence.

Rule 609(a)(3) of the Tennessee Rules of Evidence allows for the admission of a prior conviction to impeach the credibility of a defendant testifying at trial. Prior to its admission, the trial court is required to determine whether "the conviction's probative value on credibility outweighs its unfair prejudicial effect on substantive issues." Tenn. R. Evid. 609(a)(3). This court will reverse a trial court's decision only if the trial court abused its discretion. State v. Williamson, 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995).

In determining whether the probative value of a prior conviction on the issue of credibility outweighs its unfair prejudicial effect on the substantive issues, a trial court should consider (1) the relevance of the impeaching conviction with respect to credibility, and (2) the similarity between the crime in question and the underlying impeaching conviction. State v. Waller, 118 S.W.3d 368, 371 (Tenn. 2003). This court has held that forgery is a crime of dishonesty and probative of credibility. State v. Edward Talmadge McConnell, No. E1998-00288-CCA-R3-CD, 2000 WL 688588, at *4 (Tenn. Crim. App. May 30, 2000); State v. Jimmy Davis, No. 03C01-9708-CC-00371, 1999 WL 358091, at *5 (Tenn. Crim. App. at Knoxville, May 5, 1999). The fact that a prior conviction involves the same or similar crime for which the defendant is being tried does not automatically require its exclusion. State v. Baker, 956 S.W.2d 8, 15 (Tenn. Crim. App. 1997); State v. Miller, 737 S.W.2d 556, 560 (Tenn. Crim. App. 1987). However, if "the prior conviction and instant offense are similar in nature the possible prejudicial effect increases greatly and should be more carefully scrutinized." Long v. State, 607 S.W.2d 482, 486 (Tenn. Crim. App. 1980). The trial court must analyze the prior conviction and the offense on trial to determine if the conviction's probative value on credibility is outweighed by the danger of unfair prejudice.

In this case, although the trial court mentioned the requirement that the probative nature of the impeaching convictions outweigh their prejudicial effect, the court did not conduct an explicit

on-the-record balancing of the impeaching convictions at issue. However, despite this deficiency, we conclude that the trial court's admission of the defendant's forgery convictions for impeachment purposes was proper. As stated above, forgery convictions are highly probative of the defendant's credibility. We also note that the defendant was tried for eight different offenses, only one of which was forgery. Thus, the danger of prejudice was minimal on the other seven counts for which the defendant was tried. The fact that the jury acquitted the defendant on two of the offenses (aggravated burglary and theft, both involving victim Buchanan) reveals that the jury was able to examine the evidence of each offense and set aside any potentially prejudicial effect the impeaching convictions may have had. Although the trial court did not conduct an explicit on-the-record balancing test, it did note concern over the "sheer mass" of the impeaching convictions the state sought to introduce and their potential to prejudice the jury and accordingly limited the number of impeaching convictions. Finally, during the Rule 609 hearing, the trial court stated its intention to issue a limiting instruction to the jury during the court's final charge, in which it would admonish the jury that the convictions could only be used to assess the defendant's credibility. The jury instructions do not appear in the record, and accordingly, we must presume that the trial court properly gave this instruction. Finding no error regarding this issue, we deny the defendant relief.

V. SENTENCING

The defendant's final issue is that the trial court improperly sentenced him. The nature of the defendant's claim is threefold. First, the defendant asserts that the trial court imposed excessive sentences for the defendant's two aggravated burglary convictions. Second, the defendant argues that the trial court improperly imposed consecutive sentences in this case. Finally, the defendant asserts that the trial court improperly ordered that the defendant's sentence in this case would be served consecutive to his sentences in previous cases.

Prior to the sentencing hearing, the state and the defendant agreed that the defendant would be sentenced to a term of six years as a career offender for his forgery conviction, and that he would be sentenced to twelve years as a career offender for each theft conviction. The parties also agreed that the defendant would be sentenced as a Range III, persistent offender, on each aggravated burglary conviction. Thus, the only sentencing issues to be resolved by the trial court were the length of sentence for the aggravated burglary convictions and consecutive sentencing.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing

principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> [T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994) (citation omitted); see Tenn. Code Ann. § 40-35-210(e) (2006).

Length of Sentence

At the defendant's sentencing hearing, the defendant elected to be sentenced on his aggravated burglary convictions under the revised sentencing act as enacted by the Tennessee General Assembly in 2005, thus waiving any ex post facto challenges he might have otherwise had. Tennessee's revised sentencing act provides:

> (c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:
>
> > (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
> > (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c)(1)-(2) (2006). The weight to be afforded an enhancement or mitigating factor is left to the trial court's discretion so long as its use complies with the purposes and principles of the 1989 Sentencing Act and the court's findings are adequately supported by the record. Id. § -210 (d)-(f); State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

While the court can weigh sentence enhancement factors as it chooses, the court may only consider the factors if they are "appropriate for the offense" and "not already . . . essential element[s] of the offense." Tenn. Code Ann. § 40-35-114 (2006). These limitations exclude enhancement factors "based on facts which are used to prove the offense" or "facts which establish the elements of the offense charged." Jones, 883 S.W.2d at 601. Our supreme court has stated that "[t]he purpose of the limitations is to avoid enhancing the length of sentences based on factors the Legislature took into consideration when establishing the range of punishment for the offense." State v. Poole, 945

S.W.2d 93, 98 (Tenn. 1997); Jones, 883 S.W.2d at 601.

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; Moss, 727 S.W.2d at 236-37.

In this case, the trial court applied two enhancement factors to the defendant's sentences: his previous history of criminal convictions in addition to those necessary to establish the appropriate range and the defendant's failure to comply with release conditions in the past. Tenn. Code Ann. § 40-35-114(1), (8) (2006). The defendant proposed three mitigating factors: "The defendant's criminal conduct neither caused nor threatened serious bodily injury," "[s]ubstantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense," and "[t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct." Id. § 40-35-113(1), (3), (11). However, the trial court found that the evidence did not support the application of the proposed mitigating factors to the defendant's case. The trial court ordered that the defendant be sentenced to fourteen years on each aggravated burglary conviction. The defendant argues that these sentences were excessive. We disagree.

Initially, we note that the defendant's fourteen-year sentence for each aggravated robbery conviction was within the ten-to-fifteen-year range he could have received for committing a Class C felony as a Range III, persistent offender. See id. § 30-35-112(c)(3). Regarding the trial court's application of the "previous criminal convictions" enhancement factor, we first note that as relevant to this defendant, our sentencing guidelines define a "persistent offender" as a defendant who has received "[a]ny combination of five (5) or more prior felony convictions . . . within the next two (2) lower felony classes." Id. § 40-35-107(a)(1). For sentencing purposes, except in certain instances not applicable here, "convictions for multiple felonies committed within the same twenty-four-hour period constitute one (1) conviction for the purpose of determining prior convictions." Id. § (b)(4). A review of the defendant's criminal history indicates that the defendant has twenty-three prior convictions for forgery, a Class E felony, and one prior conviction for obtaining a controlled substance by fraud, a Class C felony. When the twenty-four-hour rule is applied, the number of convictions for sentencing purposes is reduced to eleven Class E felonies and one Class D felony. However, this reduced number of felonies, twelve, is still well above the five Class C, D, or E felonies necessary to establish the defendant as a Range III, persistent offender. Thus, the trial court's application of the "previous criminal convictions" enhancement factor to the defendant's aggravated burglary sentences was appropriate.

The defendant argues that application of the enhancement factor whereby the defendant failed to comply with release conditions in the past is not supported by the record. We disagree. At the sentencing hearing, the defendant's former community corrections officer, Wayne Lee, testified that

the defendant was placed on community corrections in October 1998, but that the defendant did not stay on community corrections for a long time because the defendant was later arrested and convicted for forgery, which led to his community corrections sentence being revoked. Additionally, the presentence report notes that in addition to the revoked community corrections sentence referenced by Lee at the sentencing hearing, the defendant was released on parole in June 2000, but his parole was revoked in April 2001. Thus, the trial court properly found that application of this enhancement factor was supported by a preponderance of evidence.

Regarding the three proposed mitigating factors, the trial court specifically noted that it considered the mitigating factors but found that they were not supported by the evidence. Such was within the trial court's discretion. On appeal, the defendant bases two of the mitigating factors on the fact that he believed that the guns he took from the Meyers residence belonged to Charles Massengill. The jury considered and rejected this argument in convicting the defendant, and we conclude that this argument does not excuse the defendant's participation in his crimes or justify his conduct. Thus, we conclude that the trial court did not err in not applying mitigating factors to the defendant's sentence.

In conclusion, the trial court properly applied both enhancement factors to the defendant's sentence and properly refused to apply mitigating factors to the sentence. The trial court's imposition of a fourteen-year sentence on each aggravated burglary conviction was consistent with the principles of sentencing and fully supported by the record. Thus, the defendant is not entitled to relief on this issue.

Consecutive Sentencing

The trial court imposed a total effective sentence of thirty-four years in this case as follows:

Column 1	Column 2 (consecutive to Column 1)	Column 3 (consecutive to Columns 1 and 2)
Forgery: 6 years	Aggravated Burglary (Goins): 14 years concurrent with: Theft (Goins): 12 years	Aggravated Burglary (Meyers): 14 years concurrent with: Theft (Meyers): 12 years
Effective Sentence: 6 years	Effective Sentence: 14 years	Effective Sentence: 14 years

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a

preponderance of the evidence that "[t]he defendant is an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2) (2006). The trial court is required to "specifically recite the reasons" behind imposition of a consecutive sentence. See Tenn. R. Crim. P. 32(c)(1); see State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing). As stated above, the defendant had, for sentencing purposes, twelve prior felony convictions, eleven for forgery and one for obtaining a controlled substance by fraud, and the trial court stated on the record that it was imposing consecutive sentences based on the defendant's "extensive record of criminal conduct." Thus, the trial court's imposition of consecutive sentences in this case was proper.

The trial court also ordered that the defendant's sentences in this case would be served consecutively to all prior unserved sentences. Rule 32(c)(2) of the Tennessee Rules of Criminal Procedure permits a trial court to impose such a manner of sentence. The trial court did not state on the record any specific reason why the defendant's sentence in this case should be served consecutively to his unserved Tennessee sentences, as Rule 32 requires. However, this court has previously affirmed consecutive sentences where the trial court did not make specific on-the-record findings to justify consecutive sentencing but where this court, in light of its power of de novo review, reviewed the record and determined that such factors were evident in the record. See State v. James A. Mellon, No. E2006-00791-CCA-R3-CD, 2007 WL 1319370, at *10 (Tenn. Crim. App. May 7, 2007), app. denied, (Tenn. Sept. 24, 2007). As stated above, the the defendant had an extensive record of criminal convictions. Therefore, ordering the defendant's sentence in this case to be served consecutively to his unserved sentences based on the "extensive record of criminal conduct" factor enumerated in Tennessee Code Annotated section 40-35-115(b)(2) was proper. The defendant is accordingly denied relief on this issue.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

_____

D. KELLY THOMAS, JR., JUDGE